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September 4, 2006

Via Electronic Mail
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Section 1813 ROW Study
Office of Indian Energy and Economic Development
Room 20 – South Interior Building
1951 Constitution Avenue, N.W.
Washington, D.C. 20240

RE: Comments on Draft Report for Section 1813 Study of Indian Energy Rights of Way.

Dear Federal Official:

On behalf of the Rosebud Sioux Tribe ("Tribe") in South Dakota, I hereby submit the following comments with regard to the draft report on energy rights of way ("ROW") on Indian lands based on the study conducted by the Department of Interior and Department of Energy ("Departments") in accordance with the Energy Policy Act of 2005, Public Law 109-58, Title XVIII, Section 1813 (referred to as the "Section 1813 Study"). While these comments primarily focus on the Tribe's concerns with respect to the draft report, they shall also serve to supplement and incorporate earlier submissions from the Tribe regarding this matter.

The Tribe appreciates the efforts that the Departments undertook to conduct a full study on energy ROWs on Indian lands and to consult with all interested parties, as directed by Congress, in spite of the short time frame in which to accomplish all of the objectives. Generally, we believe the draft report fairly addresses some of the primary issues considered in the study. However, the Tribe still has concerns, as described below, and makes several recommendations for the Departments to incorporate in developing and issuing the final report.

I. THE REPORT FAILS TO ADDRESS ISSUES AND CONCERNS RAISED BY THE ROSEBUD SIOUX TRIBE.

The draft report does not address any of the concerns raised by the Rosebud Sioux Tribe in the written comments we submitted on May 15, 2006 and the oral remarks we made during the scoping process. Specifically, the Departments failed to consider whether the Departments and the industry have been in compliance with existing statutory provisions and regulations governing energy rights of way on Indian lands. Instead, the Departments focused solely on the industry and tribes, their failure to have successful negotiations, and the compensation issues.

However, the Departments must review whether or not the federal government is sufficiently carrying out its own duties, as required under federal law.

The Rosebud Sioux Tribe does not have the time or the resources to develop a comprehensive report that would be responsive to the broad scope of information and related analysis, as set forth in Section 1813. However, the Tribe spent time and energy to review and submit information on a specific set of ROW granted by the BIA to the Nebraska Electric Generating and Transmission Co-Op (NEGTCO). We included background information, as well as relevant ROW valuation, compliance and oversight issues. Several pertinent issues implicated by our example could have been addressed by the Section 1813 draft report, including appraisal, oversight, transfer of interests, and the Department's compliance with relevant treaties, statutes, regulations, and the specific terms of the conveyance instruments. We expressed concern that the standards used by the Department for determining fair and appropriate compensation for tribes were not supported by documentation. We were disappointed that this information was not included in or addressed by the draft report.

The draft report did, however, include unverified information submitted by Edison Electric Institute (EEI) and the Interstate National Gas Association of America (INGAA), who volunteered to survey and collect from their membership the following information on energy ROWs on tribal land: costs, terms and conditions of energy ROW renewals, data on appraised value of lands, and comparative data about terms and conditions of the original ROW contract. The information provided by EEI and INGAA at Sections 5.5.1 and 5.5.2 was included in the draft report despite the repeated indications by the Departments that only that information that was independently verified would be included in the draft report.

Because the information submitted by EEI and INGAA was not independently verified, we believe it should be stricken from the final report. The inclusion of such information would be particularly unfair to tribes like the Rosebud Sioux Tribe, who spent considerable time and effort to comply with the Departments' request for information. Furthermore, the inclusion of unverified information will lead to false conclusions that could unfairly impact the outcome of this study.

II. THE FINAL REPORT SHOULD ACKNOWLEDGE THE FEDERAL GOVERNMENT'S SPECIFIC COMPLIANCE AND OVERSIGHT RESPONSIBILITIES.

The draft report fails to address the federal government's responsibilities and duties to comply with regulatory and statutory requirements regarding appraisal, management and oversight of Indian ROWs, all of which directly related and contribute to the issue of historic rates of compensation. As set forth in our comments, we have demonstrated the federal government's failure to meet these duties and responsibilities with respect to the ROW granted on Rosebud's lands that we examined.

Federal compliance and oversight of ROW granted on tribal lands should have been a core component of the study addressed in the draft report. The federal government has legal and statutory trust responsibilities to protect tribal trust lands and resources, a legal and morale obligation that does not extend to private, state and federal lands which are interpreted to exist for the "public benefit." Federal compliance should be further considered in the final report. We believe that the federal trust responsibility owed to Indian Tribes far outweighs any alleged responsibility the federal government may have in ensuring cost-efficient energy to the general American public, at the expense of our lands and resources.

III. THE FINAL REPORT SHOULD INCORPORATE A SUMMARY OF FINDINGS FROM THE STUDY.

The draft report makes several statements of findings throughout the draft, but does not summarize all of those findings under one section. The Tribe believes it is imperative for the final report to include a summary of findings to inform the reader and to serve as a general roadmap to the report.

Based on the Departments' research, consideration and analysis of related national energy transportation policies, the draft report documents the establishment of a uniform federal process, including procedures for ROW applications on tribal lands. These procedures arise from the Indian Right-of-Way Act of 1948 and implementing regulations. Moreover, the draft report acknowledges that these procedures provide a framework enabling tribes to conduct substantial oversight authority for energy ROWs on tribal lands under the statute and regulations. Similar directly-related policies were found to exist in historical energy ROW statutes and regulations, some of which required tribal consent. Overall, tribal consent is supported as general practice.

Moreover, the draft report aptly recognizes that no evidence supports the contentions that tribal consent endangers national energy security or that tribal consent causes demonstrable harm or increases costs to energy consumers. These should be set forth as the two main findings of the report. In addition, several other findings specifically made in the draft report should be included as follows:

- Abrogating tribal consent would reduce tribal authority and control over tribal land and resources, diminishing tribal sovereignty and self-determination.
- Tribal decision-making regarding energy ROWs on tribal lands is strongly supported by past and current policies put in place by Congress and the executive branch.
- Successful relationships between Tribes and energy companies have a direct correlation to successful energy ROW negotiations and valuation.

While these statements and acknowledgments are clearly supported throughout the draft report, they would be much more effective if they were stated upfront in the final report rather than buried within and throughout the report.

And finally, contrary to recent assertions by industry representatives, there is no substantiated evidence that tribal consent could somehow threaten the ability of the American energy industry to compete in the global marketplace. It is simply ludicrous to believe that preserving and strengthening tribal right of consent for energy ROW on tribal lands could endanger or undercut the powerful American energy industry's position on a global scale.

IV. THE DEPARTMENTS SHOULD REJECT THE "OPTIONS" PRESENTED TO CONGRESS BASED ON ITS FINDINGS.

Because the report found that tribal consent has no demonstrable or adverse impact on consumers or issues for handling national emergencies, the options for legislative action are not supported. Therefore, the final report should include an overall finding that no legislative action is needed by Congress. The facts simply do not support the options set forth in the draft report. Instead, the Departments should consider incentives that promote the cooperation of both tribes and the industry and allow the parties themselves to address these issues rather than encouraging Congress to act even though it is clear that no congressional action is needed or required. The options suggested are drastic and inappropriate. Furthermore, they are contrary to the fiduciary obligations that the federal government has to Indian Tribes. Legislative action would negatively impact those tribes and energy companies that have followed current laws and policies to successfully arrive at an agreement on ROWs on Indian lands.

The Tribe strongly recommends that no options be included in the final report, which is consistent with the findings made by the study as well as the first option. However, in the event the Departments determine that legislative options are necessary, the Tribe strongly believes only the first two options suggested in the draft report are supported by the study. The second option, suggesting that Congress provide a legislative clarification that tribal consent is a right enjoyed by *every* tribe in the United States, including non-IRA and OIWA tribes, is also supported by the study. Current laws, regulations and policies discussed in the draft support tribal consent for IRA tribes, but this should extend to all tribes. However, the Rosebud Sioux Tribe does not believe that this legislative option is necessary, as current laws, regulations and practices acknowledge the right of tribal consent applies to all federally recognized Indian Tribes.

The remaining three options are wholly inconsistent with the draft report's finding of tribal sovereignty and self-determination, which is supported by current law and policy as found in the study. The fourth option, which specifically authorizes the condemnation of tribal lands for public necessity, is also inconsistent with the study's finding of strong support for tribal decision-making. Condemnation is an unnecessarily extreme option, particularly in light of the fact that the draft report found that tribal consent is not an issue in an emergency situation and that no major problems exist.

We recognize that while there may be a few outstanding issues with individual tribes and energy companies in negotiating ROWs on Indian lands, there are no major problems that could not be handled by the tribes, the industry and the Departments. Therefore, we encourage the Departments to reconsider the need for legislative options in the final report.

V. TREATY RIGHTS MUST BE FULLY ACKNOWLEDGED.

The Rosebud Sioux Tribe is concerned that the draft report fails to address the importance of Treaties in discussing the right of Tribes to consent to energy ROWs on Indian lands. The Rosebud Sioux Tribe adamantly insists on retaining our sovereign right to control our tribal lands, as granted under retained Treaty rights, our Constitution and governmental organization pursuant to the Indian Reorganization Act of 1934. The United States entered into Treaties with Indian Tribes based the authority granted to it in the U.S. Constitution to deal with the sovereign Indian Tribes. Article I, Section 8, Clause 3. Under the U.S. Constitution, the Treaties are the “supreme law of the land.” Article IV, Section 2.

The federal government is empowered to deal with Indian Tribes on a government-to-government basis only through these specific and limited powers created and granted to it under the U.S. Constitution and the resulting statutory and regulatory laws that flow from it. As such, the federal government is bound by the Treaties and the pledges made therein. The tribal right of consent is recognized and acknowledged in our Treaty, and must be respected now.

The Fort Laramie Treaty of 1868 expressly reserves full tribal ownership and use of reservation lands. Article II of the Treaty provides:

[The Rosebud Sioux Reservation is] set apart for the absolute and undisturbed use and occupation of the Indians herein named . . . and the United States now solemnly agrees that no persons, except those herein designated and authorized so to do, and except such officers, agents, and employees of the government as may be authorized to enter upon Indian reservations in discharge of duties enjoined by law, shall ever be permitted to pass over, settle upon, or reside in the territory described in this article....

Rosebud Sioux Reservation lands are protected from cession without the consent of the Tribe in Article XII:

No treaty for the cession of any portion or part of the reservation herein described which may be held in common, shall be of any validity or force as against the said Indians unless executed and signed by at least three-fourths of all the adult male Indians occupying or interested in the same, and no cession by the tribe shall be understood or construed in such manner as to deprive, without his consent, any individual member of the tribe of his rights to any tract of land selected by him as provided in Article VI of this treaty.

By its specific plain language and meaning, Article XII protects both tribal lands and allotted lands from any cession without the prior consent of the Tribe or the allottee. See also Article XVI (*No white person shall be permitted to settle upon or cross Indian lands reserved as hunting lands*).

Moreover, the Indian Reorganization Act expressly provides that the Rosebud Sioux Tribe retains the right to veto any decision by the Secretary of the Interior concerning the use or dispensation of Rosebud Sioux lands. The right to control Rosebud Sioux lands, preserved by the Treaty of 1868 and the IRA, is a valuable aspect of reserved sovereignty and a property right. Accordingly, recommending to Congress, as an option, the condemnation of tribal lands without the consent of the Indian Tribe would violate the terms of our Treaty, guaranteed by the Treaty Clause, the Indian Commerce Clause, and the Fifth Amendment Takings Clause of the U.S. Constitution. Therefore, we strongly recommend that the final report discuss the implication of Treaties on tribal consent.

VI. CONCLUSION.

The Rosebud Sioux Tribe appreciates the Departments' efforts to conduct the study and to issue a fair and adequate draft report based solely on the facts rather than unfounded and unsubstantiated hypothetical suppositions. In addition, we have made several suggestions to improve the final report. First, the final report issued by the Departments to Congress should include an Executive Summary or findings that details all of the findings made in the draft report to ensure that they are upfront and forthcoming with the results of the study. Second, the final report should incorporate a discussion of Treaties, the federal government's fiduciary duty, and the Departments' compliance with existing statutes, regulations, and transfer instrument. Third, information submitted by the Rosebud Sioux Tribe during previous comment periods that was excluded from the draft report should be incorporated or acknowledged in the final report. And finally, the inclusion of unverified information provided by EEI and INGAA is patently unfair and should not be included in the final report.

Thank you for your favorable consideration of these comments and concerns raised by the Rosebud Sioux Tribe. If you have any questions or need additional information, please feel free to contact me at (605) 747-2381, or you may contact our Washington, D.C. legal counsel Shenan Atcitty at (202) 457-7128.

Sincerely yours,

Rodney M. Bordeaux
President
ROSEBUD SIOUX TRIBE

Section 1813 ROW Study
Office of Indian Energy and Economic Development
September 4, 2006
Page 7

cc: U.S. Senator Tim Johnson
U.S. Senator John Thune
U.S. Representative Stephanie Herseth